Supreme Court, U.S.
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Docket no. 06-_____

UNITED STATES SUPREME COURT

L. PAUL DIEFFENBACH, JR.; on behalf of himself and all other persons protected by the ADEA, OWBPA, and ERISA laws

Petitioner *Pro Se*

V.

INTERNATIONAL REHABILITATION ASSOCIATES, INC

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether an employer can impose the making of general liabilty release as a condition ofthe employee's receiving an otherwise fully accrued ERISA-regulated benefit;

2) Whether the above issue (i.e, whether the employer's mandatory liabilty policy practice is intrinsically illegal) should have ever been sent to arbitration where Respondent's own arbitration rules clearly state that the arbitrator has no subject matter authority over company "policies and practices";

3) Whether the 1991 Older Workers Benefit Protection Act (OWBPA) flatly prohibits the attachment of the ADEA waiver directly to the same basic layoff benefit given to younger workers (in the same layoff group) for whom the execution of an ADEAwaiver is a meaningless act, and whether such tactic is age discrimination in and of itself;

OR, stated in OWBPA's own wording:

whether a laid-off employee's **basic severance** (i.e, that benefit promised by an employer to an employee in the event of no-fault-of-his-own job loss) is "something to which the person is already entitled" under OWBPA's special consideration clause:

29 USC 626; in relevant part:

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum:

(D) the individual waives rights or claims only in exchange for onsideration in addition to anything of value to which the individual already is entitled;

(this issue is of particular importance in this case as the arbitrator was able to get past this essential part of OWBPA with the highly dubious finding that the employee's basic severance is NOT an "entitlement" as contemplated by the wording of the (OWBPA) statute);

4) Exactly how "thin" an employment dispute arbitration agreement can be and still constitute informed consent to the substitution of a private, for-profit decisionmaker for a court proceeding (this employer's standard arbitration "agreement" consists of nothing more than a single sentence tacked on to an acknowledgement of receipt of a sealed pack of papers);

5) Under what conditions and what issues a party resisting arbitration in a federal court can demand a sufficiency-of-the-contract jury trial under 9 USC 4:

9 USC 4; in relevant part:

> Sec. 4: Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination
>
> ---
>
> If the making of the arbitration agreement or the failure, neglect, or refusal to perform be in issue .....the party alleged to be in default may, except in cases of admiralty, **demand a jury trial** on such issue.

6) Whether company-paid arbitrators should be permitted to make substantive law decisions having a controlling effect on employer's entire employee base, and possible precedential effect even beyond that;

7) Whether a specific signer can reserve the right of elective rejection of an arbitrator's decision (i.e, direct, binding refusal to accept the arbitrator's decision) by altering the wording of the arbitration agreement at the time of signing;

8) Whether an employment-dispute arbitrator's making of his final decsion without a genuine hearing, over the strenuous objections of a party, should be automatic grounds for the overseeing federal court to disallow such arbitrator's decision on complaint of the aggrieved party.;

9) Whether the court-type summary judgment, or Motion for Summary Judgment, can be introduced into the employment dispute arbitration forum by private contract (the lower court says it can, while the American Arbitration Association itself says it can't). and whether there is any place *at all* for such court-type motion for summary judgment, regardless of origin

in employment-dispute arbitration, which is already a less-than-trial, summary type process;

10) Whether it was flagrant error for the lower court to side with the arbitrator where an arbitrator and the district court rendered directly conflicting decisions on the same issue;

11) Whether it was flagrant error for the lower court to find that employee (Petitioner) had "consented", before the fact, to arbitrator's resolution of entire case *sua sponte*, without notice, hearing, or discovery, where the record is abundantly clear that employee gave no such consent, nor commited any other act or omission which even remotely constitutes such blanket "consent";

12) Whether it was flagrant error for the lower court to leap directly from mere fact that Petitioner received a severance payment to a finding that Petitioner's ADEA waiver was "knowing and voluntary", as defined by OWBPA, without making the required inquiry into whether the monies received were a *consideration* for the giving of the waiver or were, in fact, monies which the employer was already obligated to pay the severed employee (Petitioner);

13) Whether it was flagrant error for the lower court to back that clause in a separation-from-employment contract under which the employer reserves an unfterred right to modify the official rules of the American Arbitration Association when the AAA itself is opposed to modification or setting aside of its Rules by private contract or other party-specific measures

14) Whether the recent, and increasing, rise in the practice of having employment dispute arbitration paid for entirely by the employer, while well-intentioned, creates an inherently skewed playing field, and otherwise hopelessly compromises arbitration's basic promise of a neutral and unbiased dispute resolution forum (as explained elsewhere in this Petition, this case is rife with evidence of this phenomenon at work).

PARTIES TO THE PROCEEDINGS

Petitioner, Lincoln Paul Dieffenbach, Jr, as Plainitff in the original proceedings, is a former employee of the Respondent; for both personal and practical reasons, Petitioner has acted as his own advocate throughout.

Respondent, International Rehabilitation Associates, Inc, is a Delaware Corporation doing business under the trade name *Intracorp* (and will be referred to as such throughout the rest of this pleading) and is a subsidiary of the Cigna Corpoartion; one of the nation's largest providers of health insurance and related services.

There are not now and never were any other parties to the proceedings in the lower court(s).

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REPORTING OF DECISIONS

Neither the Court of Appeals nor the District Court's decisions were reported in this case.

JURISDICTIONAL STATEMENT

Date of entry of the original decison of the lower court was October 18, 2005; Petitioner, wishing to inquire as to whether what Petitioner felt was a particularly short-sighted decision reflected the view of the full court, filed a Petition for Rehearing *en banc*, which Petition was denied in an Order dated November 16, 2005.

As Petitioner was finishing his original papers for this Court, the Northeast was hit with a near-record snowstorm, forcing Petitioner to request an emergency extention of time to file, upon which Mr. Justice Breyer extended the time for filing to and including April 15, 2006.

Because of the difficulty of compliance by a person working on his own with the published-booklet format, Petitioner's original papers were submitted in 8-1/2 x 11 format along with a Motion for Leave to so proceed. These first filings were promptly sent back to Petitioner by the Clerk's Office along with a letter, dated April 21, 2006, explaining that 8-1/2 x 11 filings can only be made as part of a Petition to Proceed *in forma pauperis*. By Rule, return of filings for correction in format extends the filing deadline another 60 days, thus fixing the ultimate date for seeking relief in this Court as June 20, 2006.

Statutory basis for jurisdiction is 28 USC 1254(1); discretionary review of civil decisions of the circuit courts.

TEXT OF STATUTES

Applicable parts of the various statutes are quoted at the places in this Petition where they are relevant.

STATEMENT OF THE CASE

The underlying lawsuit had its origins in the lowest level of the Pennsylvanis state courts when Petitioner instituted an action against Respondent, as his former employer, under the Pennsylvania wage laws seeking to compel payment of a severance benefit which was being withheld account the singular reason of Petitioner's refusal to execute a general, or "global", as it will be referred to in the remainer of this pleading, liabilty release which had been "piggybacked" onto the benefit as a condition of payment. Respondent, as employer, never disputed Petitioner's, as force-reduction lay-off, basic eligibility for the benefit; as now, the sole issue was the dispute over the release.

Substantive facts giving rise to the dispute

1) Petitioner commenced employment with the Respondent in April of 1990 at the company's then-headquarters at Berwyn, Pa, ("Berwyn facility"); in the then-newly created position of overnight-shift computer operator. At age 44, Petitioner, even then, was one of the oldest employees at the Berwyn facility. During his entire tenure with Intracorp, Petitioner was the only person to ever work this job and the only person in the compnay whose regular hours were midnight to 8 AM (Sunday through Thursday).

2) Also during his entire stay with Intracorp, Petitioner was an exemplary employee who never missed a day in 12 years, always received favorable performance reviews, always made his way to work even the worst winter weather, and was always the first person his superiors would call when younger workers on the 4-to-8 shift were unavailable.

3) At the time Petitioner joined Intracorp, it was an independent company with its main offices and central data processing facility at the Berwyn facility. Sometime during the mid-1990's, however, the Cigna organization began to take control of Intracorp; the major influence of Cigna control

was the relocation of all persons not directly involved in computer operations from the Berwyn facility to downtown Philadelphia and into the same building where Cigna itself is headquartered.

4) The first real sign of Cigna at Berwyn came just after Y2K day when it was demanded that all Intracorp employees sign up to the Cigna arbitration program. One evening in January of 2000 Petitioner arrived at work at his usual time and found a sealed pack of employee manual updates on his desk; attach ed to the outside of the cellophane-wrapped packet of papers was an acknowledgment of receipt. Along with the basic acknowledgment that the papers had been received, was the following clause, tacked on to a single sentence:

> "2) I will use the Company's internal and external dispute resolution processes to resolve legal claims against the Company - therefore, rather than go to court or go to a governmental agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to final and binding neutral third party arbitration."

The single-clause arbitration "agreement" was not backed up with, accompanied by, nor followed up by, any other dissemination of information about what the employees were being "asked" to sign; the document was simply placed on their desks with a clearly implicit "sign it or else" ultimatum; the "or else" was never clearly specified.

5) The manner in which the arbitration clause was being essen tially forced on them caused considerable resentment and concern among the affected employees; there was discussion of a group signing boycott and/or a group grievance to the Pennsylvania Department of Labor, but nothing ever came of it and one by one the affected employees either signed the document, or resigned from Intracorp until Petitioner was the last one remaining who hadn't.

6) Petitioner, being the lone holdout, started receiving increas- ing pressure from his superiors to sign the "agreement". With

great reserve, Petitoner, believing the chances that he would ever become involved in a major lawsuit with Intracorp/Cigna to be negligible, and further believing that no court would ever take such a razor-thin contract seriously, Petitioner caved in and signed the document on January 21, 2000. Before doing so, though, Petitioner crossed out the words "rather than go" (to court) and wrote in "before going" (to court) so as to effec tively negate the implied waiver of the right of access to the courts for a major labor grievance. The at-issue document, exactly as it was signed, is included in this Petition as Apx13.

7) After the arbitration-agreement "rebellion" quieted down, things at the Berwyn facility returned to more-or-less normal until April of 2002 when it was announced that the Berwyn facility would be closing and that most of the remaining employees there, including Petitioner, were being eliminated. The official announcement listed eight people being laid off; of these, four were terminated outright (i.e, escorted off the premises that day), while Petitioner and three others were reatained to keep things operating until the final shut-down, scheduled for August 31.

8) Petitioner was immediately suspicious of Intracorp's claim that his position was being "eliminated". After 12 years the overnight shift had become an integral part of the company's computer operations and eliminating this position to save a relatively minor amount of money would be counterproductive in the extreme. Accordingly, it soon became an open secret that the computer facility was not being "eliminated" at all. but was simply being *relocated*; the equipment was being dismantled and trucked some 250 miles to an existing facility in the Hartford, Connecticut, area, where it was being reinstalled, and where *someone* was still going to have to man the midnight-to-8AM shift.

9) Following shortly behind the layoff notice itself, Petitioner was given a proposed severance contract to sign; the most prominent part of the severance contract was the spelling out of the severance benefit to which Petitioner, as a no-fault-of-

his-own job loss, was entitled under the Cigna Severance Plan (the Court should take due note that the word "Plan", as used here, is an ERISA legal term as well as a mere descriptive term.. Upon first reading of the proposed contract, Petitioner, who has no formal legal training, and (at that time, anyway) no knowledge of labor law, was struck immediately by the way in which a "global" liability release had been imposed as condition of receiving his basic severance benefit.

10) Since the announced force reduction layoffs included persons over the age of 40, an OWBPA-mandated statistical summary of the layoff group was included with the proposed severance contract; listed were three ADEA protected persons and five non-ADEA's. Of the entire group, Petitioner was the senior party, both in terms of actual age (56) and years on the job (12); i.e, Petitioner was the one which OWBPA was most intended to protect.

11) Since the liability release clause also contained an ADEA waiver, it likewise occurred to Petitioner that the very same basic severance benefit was also being received by the under-40's *for whom an ADEA waiver is a meaningless act*, making it all the more intuitively obvious that the imposition of the liability release/ADEA waiver as condition of receiving basic benefits was probably illegal. A visit to the county law library later that day confirmed what Petitioner had suspected all along: that imposition by an employer of self-serving conditions of receiving earned benefits is considered to be against Pennsylvania public policy, and is directly inconsistent with the *special consideration* clause of OWBPA (quoted, in relevant part, on p i of this Petition).

12) The following day Petitioner wrote a letter to Intarcorp's Director of Human Resources detailing the reasons he felt the inclusion of the liability release in the severance contract was illegal, and further informing her that Petitioner was not going to sign the contract until the liability release, or at leastways the ADEA waiver, was removed. A few days later Petitioner received an e-mail reply stating that she (the HR Dir) had dis-

cussed Petitioner's letter with Cigna's legal department who insisted that the inclusion of the release/ADEA waiver as part of the severance benefit was legal and proper.

==> If Petitioner had to define one particular event which could be considered the "opening salvo" of the legal battles resulting in this matter now being placed on the steps of this Court, this exchange of letters would have to be it.

13) Notwithstanding the above, Petitioner still felt that the matter could be resolved amicably. In a letter to the Director of Human Resources dated May 2, 2002, Petitioner pointed out that one of the stated purposes of the 1991 OWBPA was to encourage employers to negotiate "tailored" severance packages for ADEA-protected reduction-in-force lay-offs, and emphasizing that he (Petitioner) was both the oldest and longest-on-the-job person in the layoff group, Petitioner suggested that an **early retirement** offer might be in order, and that Petitioner would accept even the most modest of permanent-income offers over a fixed-duration severance. In a return e-mail, the HR Dir said she would discuss the matter with the "higher ups"; that was the last Petitioner ever heard of the early retirement proposal.

14) While Petitioner and Respondent were going thrust-and-parry over the liabilty release issue, another one of Petitioner's suspicions about the job "eliminations" was confirmed: Petitioner's job was not being eliminated at all, but rather was being given over to two new hires, ages 26 and 29, from a Connecticut personnel agency, who would be doing the exact same work (as Petitioner) on the exact same schedule on the exact same equipment, but in a different place So brash was the Respondent in their belief that everyone would accept their story of "elimination" at face value, they even had the gall to send Petitioner *his own replacements* and demand that he train them. Of the eight people in the layoff group, *Petitioner was the only one for whom direct replacements were recruited, hired, and trained.* Now Petitioner had a much more substantial reason, other that the simple fact that it was illegal, for not wanting to sign any ADEA waiver.

15) In addition to Petitioner discovering he was displaced by new workers half his age, it also came to light during this time that the OWBPA statistical summary of the layoff group had been "fudged". At least three of the five names in the under-40 count should never have been on the list: the youngest of all, 28, was actually a disciplinary firing (Respondent admitted as much be telling EEOC investigators that this person was a "resignation"), while two more mid-30's males were being "laid off" on paper only so that they could be immediately rehired for their same jobs by the Connecticut facility.

16) Notwithstanding the rising tide of animosity between Petitioner and his soon-to-be-ex-employer, Petitioner, about mid-July, made one last effort to resolve the liabilty release stalemate.by writing another letter to the Director of Human Resources pointing out that OWBPA clearly mandates that ADEA be directly mentioned by name in any release purporting to cover ADEA, and since the company's published policy itself (mandating the release) makes no mention of ADEA, the policy, **even if otherwise legal,** does not extend to ADEA, and, accordingly, Petitioner would sign the disputed contract, *with the release in it,* if the ADEA reference were deleted. To this proposal Petitioner never recieved any response, but the message was clear: Petitioner's "options" were to either execute the global release exactly as stated, or go out the door with nothing.

17) Despite several requests to do so, neither the HR Dir nor anyone else at Intracorp ever came up with a shred of explanation of how they justified imposing the ADEA waiver onto the same benefit also being given to younger layoffs in the same group for whom the ADEA waiver was a meaningless gesture for both themselves and the company. Instead, both Petitioner's immediate supervisor and in interim manager sent out to Berwyn to oversee the final shutdown, kept sending Petitioner e-mails imploring him to sign the contract or he would "forfeit" his severance package, erroneously referring to this ERISA-protected *benefit* as an "offer" or a "bonus".

18) On the morning of August 21, 2002, Petitioner, who had been scheduled to work a ceremonial "last shift" on Aug 31, was finishing up his usual overnight shift when he was summoned to the office of the aforereferenced manager. The manager, emphasizing that all the other affected persons had signed their contracts without protest, and further emphasizing that Petitioner wasn't getting a penny of severance until he signed his, told Petitioner that he didn't want any "loose ends" come shutdown day, and all but demanded that Petitioner sign the contract. Petitioner informed the interim manager that he had made his position clear and that he (Petitioner) was more convinced than ever that the contract was illegal. Later that day Petitioner received a call at home from his supervisor advising him that he had been summarily terminated and to come over and remove his personal effects from the premises.

19) Being the statutory prerequisite to an age discrimination suit in either federal or Pennsylvania state court, Petitioner instituted a two-prong Charge (that Petitioner had been laid off and then directly replaced with younger workers, and that his severance benefit being withheld because of his refusal to execute an ADEA waiver) against Intracorp/Cigna with the EEOC office in Philadelphia on September 8, 2002.

History of the proceedings in the lower courts

20) With the employer (Respondent) having rebuffed every effort by the ADEA-protected layoff (Petitioner) to resolve the impasse over the liabilty release issue, and Petitioner's "caving in" not an option, Petitioner began to research his legal options. After careful consideration, Petitioner opted for a civil suit in the Pennsylvania District Justice Court at Devon, Pa, for two reasons:

1) Pennsylvania wage laws seemed to cover the matter nicely, specifying that the employer must pay all wages and benefits "without condition", and:

2) Petitioner had a lingering score to settle with Intracorp over a 1998 wage garnishment they (Petitioner maintains)

never should have allowed (**f/n 1**, below); if Petitioner filed such a suit on or before September 17, 2002, he could get in just under the 4-year statute of limitations. Since the liabilty release issue involved a company policy, as distinguished from specific-instance disputes over basic eligibilty, Petitioner also sought, in addition to payment of the benefit, a declaratory judgment (that the policy was intrinsically illegal) and a cease-and-desist order prohibiting any further use of the policy against anyone, not just himself.
The tax matter is **totally unrelated**, factually, legally, and chronologically, the circumstances of Petitioner's leaving the employ of Intracorp. The resultant civil suit was initated on September 12, 2002.

21) On the last for Intracorp, as state-court defendant, to file a response to Petitioner's suit, Respondent removed the case to the U.S. District Court for the Eastern District of Pennsylvania at Philadelphia on grounds that matter at issue is an ERISA regulated matter; curiously, ERISA protection is something Intracorp all but refused to acknowledge when Petitioner was attempting to negotiate a resolution of the dispute. Respondent's Notice of Removal was also accompanied by a voluminous Motion to Compel Arbitration.

22) Working as best he could within the 5 day response time allowed by FAA, Petitioner answered the Motion to Compel with several defenses including Cigna's arbitration program tended to favor Cigna, that the "agreement" was woefully insufficient to constitute informed consent, that the document had been altered, and, what Petitioner felt to be his best argument, that the matter at issue was directly excluded from the (arbitration) program because Petitioner was seeking abolishment of a company policy and Cigna Rule 8 clearly states:

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1. In 1998 Intracorp allowed an inexperienced tax agent from the State of Maryland, who has absolutely no direct authority in Pennsylvania, to garnish Petitioner's wages over a relatively minor tax matter. Petitioner had $1044 diverted to Maryland before getting an injunction to stop any further such diversions.

"The arbitrator will have no power to change CIGNA's policies and procedures (including this one)."

Petitioner also demanded a jury trial on the issue of whether Cigna, whose only obligation under the arbitration agreement is to honor the employee's wage and benefit entitlements, repudiated the entire contract by refusing to pay Petitioner his severance. Petitioner also requested an in-court hearing.

23) In addition to his answer to the Motion to Compel, Petitioner also questioned the validilty of the removal from the state court, arguing that the real reason for removal was to compel arbitration; something not contemplated by either the FAA or the removal statutes, and something for which Respondent had an adequate remedy in the state court(s).

24) In a Memorandum Order dated December 23, 2002, District Judge Charles R, Weiner (now deceased) **granted** Respondent's Motion to Compel Arbitration. No hearing was held, none of the Petitioner's points were directly addressed, and the demand for jury trial was ignored entirely (Apx 5-8).

25) Having no choice but to make the best of it, Petitioner tried to approach the forced arbitration with an open mind, at one point even convincing himself that perhaps a single individual knowledgable in the subject matter is preferable to a panel of citizens given a crash course in employment law.

26) Petitioner's optimism was short-lived, however, as the first indication that he was playing against a stacked deck came with the arbitrator selection process. The Association (AAA) case manager sent Petitioner the biographical sketches of fourteen arbitrators from which to chose; of these, only **one** did not list their primary occupation as "attorney". This did not sit well at all with Petitioner as the questions to be asked about a "neutral" who is a pseudo-judge in the morning and a practicing attorney in the afternoon presiding over a case with his "sister" attorney on one side and an unrepresented on the other are obvious and many.

27) Petitioner's distrust of the lawyer-arbitrator concept was futher aggravated by the emerging trend toward the employer paying the entire bill for the proceedings and, consequently, the arbitrator's knowledge that the company's lawyers are underwriting his paycheck (technically, the arbitrator is paid by the Association, but are we really supposed to believe the arbitrator isn't aware of where his paycheck is coming from?; see next).

28) Under the AAA's current business practices in employer paid arbitrations, their bills do **not** go through the employers' normal, and "blind", 30-day accounts payable process, but rather go directly to the employer's legal department where it is expected to be paid fully and immediately out the department's operating funds. *For all intents and purposes, the arbitrator is being paid directly by one of the attorneys participating in the proceedings.*

29) Since each party is allowed three immediate strike-offs from the list of potential arbitrators, the one non-lawyer was the first one stricken from the pool by Cigna's lawyer, so she was out of the picture right from the beginning. Petitioner eventually settled on a Mr. Ralph Colflesh, whose biographical information listed legal advosor to the EEOC, as well as the Pennsylvania and New Jersey state equivalents of same, so Petitioner trusted that arbitrator Colflesh would recognize an illegal release and/or ADEA waiver when he saw one.

30) Both Cigna's and the AAA's assurances of a "quick" resolution of cases (90 days m/l) also turned out to be so much puffery as, shortly after his selection, arbitrator Colflesh came onto a scheduling teleconference on June 15, 2003, and calmly announced he was not available for any proceedings until late February of 2004; eight-and-a-half months away.

31) Nevertheless, a schedule was set calling for discovery to be completed by 12/20/03, dispositive motions to be submitted by 01/20/04 (this also did not sit well with Petitioner as the AAA's official Rules of Employment Dispute do not

even provide for "dispositive motions"; everything is oriented around the hearing on the merits), and actual hearing dates of February 22-25, 2004. This schedule was submitted to the AAA case manager and published as the dedicated schedule of the proceedings.

32) One of the first things Petitioner had done as soon as the arbitration had been docketed, before the arbitrator had even been selected, was to serve a discovery request on Intracorp seeking copies of the severance contracts of all other persons in the announced layoff group; this would not only allow Petitioner to show the arbitrator that the same benefit which was being denied Petitioner because of his refusal to execute an ADEA waiver was being freely given to others to whom ADEA did not even apply, but would also smoke out who was *really* laid off and who wasn't. As the weeks and months went by waiting for Mr. Colflesh's painfully slow schedule to come around, it became apparent that Intarcorp was "dogging" the discovery process, further fueling Petitioner's perception of employment-dispute arbitration as little more than a dog and pony show staged by and for the lawyers involved, including the arbitrator himself.

33) At about the same time as the arbitrator was chosen, the EEOC issued its final report; the EEOC verified all the essential facts: that Petitioner had been told his position was being eliminated, but that the very same work was now being done by new workers half his age, albeit in a defferent location. In what Petitioner views as a highly dubious line of reasoning, however, the EEOC concluded that, even though the new workers were working on Cigna property with Cigna equipment and under Cigna management, since the new hires were working through an agency and not direct employees of Cigna, the EEOC managed to call this "outsourcing" and was finding in favor of Intracorp/Cigna. The resultant right-to-sue letter was issued on or about June 15, 2003 and, accordingly, around mid-August Petitioner added an age discrimination claim to those matters already under litigation

34) One day while in the law library preparing his case, Petitioner came across the CA3 decision of *Lawrence v Nat'l. Westminster Bank*, 98 F.3d 61 (1996), headnote 22 of which states:

> "Former employer's alleged effort to indiuce employee to sign illegal termination agreement did not constitute violation of waiver provisions of Older Workers Benefit Protection Act (OWBPA) where employee never signed termination contract."

This made Petitioner highly apprehensive about risking the possiblity of dismissal of any claims because no real contract, as such, existed. By pure coincidence, a few days later Petitioner received another soliciation from Intarcorp informing him that they had liberalized their standard severance contract and, once again, offered it to Petitioner; heavily mindful of *Lawrence,* Petitioner replied that he would consider it *if* they would settle the lingering wage garnishment dispute at the same time.

35) Respondent agreed to reimburse Petitioner for the wage garnishment and sent a revised version of their contract. Respondent's "new" contract turned out to be basically the same contract which had been at issue all along, with the ADEA waiver still imposed directly on entitlements.

36) Still intimidated by the third circuit's *Lawrence* edict, and wishing to get the unrelated wage matter out of the way, and further believing that no truly objective decisionmaker would ever find the ADEA waiver to be valid, Petitioner, with great reserve, signed the at-issue severance contract.

37) Immediately following the signing of the contract, the attorney for the Respondent sent Petitioner an e-mail stating that she was preparing a settlement decree to submit to Judge Weiner and would send it in a couple of days. Petitioner advised her to include only the smaller claims; the age discrimination claim was going to stay because the waiver was still tied

to entitlements, and that OWBPA, in addition to prohibiting the pre-suit waiver from being imposed on entitlements, also states that an active ADEA lawsuit cannot be settled in bare exchange for entitlements.

38) Respondent's attorney, apparently feeling she had been misled by Petitioner, and apparently believing she had a can't-miss argument, immediately prepared a comprehensive Motion for a forced dismissal through the ADEA waiver. Rather than take this Motion to the arbitrator, which she certainly could have (see Apx 14), Respondent's attorney, *by her own strategic choice,* **jumped arbitration and took the Motion directly to the court.** Petitioner defensed the Motion with one of the central issues in this Petition: that the ADEA waiver is materially OWBPA-deficient as being imposed on basic layoff entitlements.

39) After receiving both the Motion and Answer, the district court, in an Order dated December 2, 2003, DENIED the Motion to enforce the ADEA waiver and ordered the age discrimination matter to continue (Apx 9).

40) Rather than accept her loss in court, however, Intarcorp's attorney attempted to conceal the fact that the ADEA waiver had failed its first real test and take the matter back to the arbitrator as a fresh issue, hoping for a more sympathetic ear.

41) Rather than submit the ADEA waiver claim to the case administrator, as required by (AAA) rule. however, Respondent's attorney communicated the claim orally directly to the arbitrator, albeit with the knowledge of Petitioner The case adminstrator then contacted Petitioner and told him the arbitrator had directed Petitioner to answer the second Motion on **two days** notice; a flagrant violation of the AAA Rules intended to give adequate time to answer any newly-intitated claims (**f/n 2**, below).

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2. AAA *National Rules for Employment Disputes* Ruke 4 mandates 10 days response time to answer any substantive claim; the Rule allows the arbitrator to enlarge it but does **not** permit the arbitrator to shorten it.

42) Petitioner was highly displeased that the Respondent's attorney was seeking a second decision on an issue that had already been ruled upon by the court, and so sent a copy of Apx 9 to Mrs. Catherine Shanks, the Director of the AAA Northeast Regional Case Management Center in Providence, R.I, along with a letter advising her that the "new" issue now in the hands of the arbitrator had already been decided by a federal court. Petitioner further advised Mrs. Shanks that he would not participate in any second-decision proceedings, and insisted that the AAA order the arbitrator, who was already showing tendencies to favor his "sister" lawyer, to cease and desist any attempts to re-decide the issue, and that Arbitrator Colflesh be ordered to stick with the published schedule. The only response Petitioner ever received to this communication was the AAA's acknowledgment that they had received it.

43) While awaiting a response to Petitioner's complaint, the December 20 discovery-completion date came and went with Petitioner still not having received a single thing from the Respondent; accordingly, a Motion to Compel Discovery was filed with the case administrator.

44) The next and only thing Petitioner heard from the case administrator was that a "management (tele)conference" with the arbitrator was scheduled for January 8, 2004; Petitioner logically assumed that this conference was to discuss the uncompleted discovery and other matters for the upcoming February hearings. Instead, the arbitrator came on the line and announced that he had reviewed the ADEA waiver and the Respondent's Motion to Enforce it, that he found the waiver legal and binding, and that case was over. Petitioner was absolutely livid but tried to remain calm as he protested his (arbitrator's) abandonment of the formal schedule without notice, and his rendering a substantive final decision without the hearing which is a guaranteed right unless clearly waived. The ultimate addition of insult to injury came in Arbitrator Colflesh's written decision in which he tried to pawn off an earlier status conference as a "hearing".

45) Immediately following the arbitrator's announcement of his dismissal of the case (as referenced earlier, the official Rules of the AAA do not even allow Motions to Dismiss), Petitioner filed a detailed grievance with the Association complaining that Arbitrator Colflesh had breached every rule there was, had usurped the authority of a federal court, and had otherwise made a mockery out of the AAA's guarantee of a fair and balanced proceeding, and, accordingly, Petitioner demanded that Arbitrator Colflesh be decertified and removed before his decision became final, and that the entire case go back to square one.

46) On February 6, 2004, the case manager sent Petitioner a copy of the arbitrator's final decision along with a bill for $4,000 and a terse one-sentence statement, totally devoid of explanation or analysis, that the Association was backing the arbitrator against Petitioner's misconduct complaint. This Petitioner firmly believes, and will always believe, that the AAA's shrug-off of Petitioner's grievance about arbitrator misconduct was motivated entirely by money concerns (getting the $4,000 receivable paid, which payment comes directly from Cigna) with little, if any, concern given to the AAA's brash promise of a "full and fair" proceeding.

47) Because of all of the above, however, Petitioner was able to take solace in the belief that no level-headed court would ever ratify such a badly mishandled arbitration; the mere fact of directly conflicting decisions between the arbitator and the court on the same single issue would be sufficent gorunds, by itlself, to disallow it. The two lower courts (CA3 in particular), however, turned out to be the ultimate disappointment in this case as both, in the eyes of this Petitioner anyway, were as bad or worse than the arbitrator himself in seeing only what they wanted to see, and trying to make water flow uphill so as to arrive at a preconceived end.

REASONS WHY THIS COURT SHOULD ACT

The reasons why this Court needs to take definitive action on the issues set forth in this Petition are multi-faceted and should be obvious.

This Petitioner took all the makings of a genuine landmark case to the second highest court in the land expecting, and having every right to expect, a take-charge decision letting the chips fall where they may; instead, Petitioner received a one-page whitewash wafting the with the clear aroma of mollycoddling a major local employer (or their legal department), and rooted in a far-fetched attempt to blame the entire situation on a single aging worker who was shown the door by his employer for the twin purposes of being replaced by workers half his age and cutting off any further accumulation of retirement benefits To support their pie-in-the-sky reasoning, the lower court cites one (ONE!) case precedent; itself grossly inappropriate to the point it is trying to make.

When the lower court's decision is viewed in light of the important issues at stake, it should be patently obvious to this Court that Petitioner's entire appeal was pre-categorized as a nuisance case and treated accordingly; the simple fact that the case was "called" on October 14 (a Friday) and the decision was in the (CA3) clerk's office the following Tuesday (see Apx 1) is hard evidence that lower court never took any part of the case , nor any of the issues it contained, with the slightest degree of seriousness.

What began in September of 2002 as a relatively simple, single-issue state-court civil suit has ballooned into a circus of bizarre and inconsistent reasoning as each of the three authorities it has been before (arbitrator, federal district court, federal court of appeals) has, literally, created more issues than they have resolved. Such outlandish notions as modification of the official Rules of the American Arbitration Association by pri-private contract, introduction of the court-type summary

judgment into employment dispute arbitration, and blanket, before-the-fact "consent"to allowing the arbitrator to decide an entire case *sua sponte*, wouldn't even *be* issues if the two lower courts hadn't made them so. These lines are not only absolutely without precedent, but fly directly in the face of some of the most established and fundamental rules of law.

Because three lower authorities went to extremes to avoid having to rule on the *real* issues, such broad-based public interest matters as the impostion of a liabilty release onto an ERISA-regulated benefit, the right to a jury trial by a party resisting compulsory arbitartion, and absolute-minimum content standards for employment-dispute arbitration contracts, **remain completely unresolved.**.

Accordingly, this Petition not only meets the two main criteria for granting certiorari, but does so several times over.

Manifest departure from established law

The main statute at issue in this dispute is the 1991 Older Workers Benefit Protect Act (29 USC 626, *et seq*), enacted in Response to Congress' concern that ADEA-protected plant-closing layoffs, or other no-fault-of-their-own terminations, were being duped or arm-twisted into waiving their ADEA protections, and to ensure that all such waivers are "knowing and voluntary".

This Court should be genuinely appalled at the way *both* lower courts were willing to turn a blind eye to uncontroverted, documented evidence that this Respondent, as a major employer, is doing exactly, EXACTLY, what OWBPA was intended to prohibit: imposing the ADEA waiver as mandatory condition of receiving basic severance entitlements, then withholding the benefit when the employee refuses to execute the waiver (**f/n 3,** below). This Petitoner cannot

3. To the best of his knowledge, Petitioner is the only person in the history of the Cigna organization to force this issue all the way to having his severance benefit withheld.

overemphasize that this is the very same bottom-dollar, formula based severance benefit freely given to younger workers in the same layoff group for whom an ADEA waiver is a meaningless act. This takes the Respondent's actions beyond the limits of OWBPA and is obvious age discrimnation in and of itself.

In 1998, OWBPA received a sweeping endorsement in *Oubre v. Entergy Operations, Inc* 522 US 422; in *Oubre*, this Court held that OWBPA "sets up its own regime", that each and every one of the Act's requirements are absolute, that the burden of compliance is directly on the employer, that the employee cannot accept a lower standard of protection, and that OWBPA-deficient waivers are not cured or ratified the mere acceptance of monies. All of this was completely lost on both lower courts as they as they seemed to jump back to the darkest ages of contract law, comimg back at Petitioner with some knid of "you're stuck with what you're careless enough to sign" mentality. Likewise, Petitioner's pleas to CA3 that he only signed the disputed contract because of one of their own edicts (Statement of the Case @ 34, 36) fell on deaf ears.

The manner in which CA3 leaped directly from the simple fact that Petiioner received a severance check without making the OWBPA-mandated inquiry into whether such monies were a *consideration* for executing waiver/release or were in fact monies the employer would legally obligated to pay Petitioner were no such thing as an ADEAwaiver is not only cause for this Court to act, but makes the at-issue decision a prime candidate for summary reversal under SCR 16.1.

To list all the cases with which CA3's decision represents a direct split would take up the entire 30-page allotment for this Petition. Not only did CA3 depart from the decisions of other federal courts appeal, but carried SCR 10.a one step further and didn't even abide *by its own* widely-cited decisions.

Of far greater concern to this Court should be the way in which CA3 has cleaved a direct split between a federal circuit

court and the American Arbitration Association's own Principles and Protocols.

The at-issue decision, by failing to rule on these issues, is endorsing **both** the concept of the introduction of the court-type Motion for Summary Judgment into the employment arbitration forum, and the unfettered "right" of specific employers to modify the official Rules of the Association to their own liking. Both of these bizarre notions clash head-on with the AAA's own published Protocols assuring its users and overseers that it will not allow individual users to bring predatory rules into the house (Respondent's whimsical "Summary Disposition" rule (Apx 16) is clearly just such a rule) and that it does not otherwise allow user-specific rules that are "materially inconsistent" with its own.

It goes without saying that if the AAA thought there was a place for a summary judgment rule in its Employment Dispute Rules, they would enact their own. Given the extent to which federal law defers to to arbitation, the official Rules of the AAA are, for all intents and purposes, law, and by condoning unwanted and undesirable changes in those Rules, CA3 is making new arbitartion law; and very bad law at that.

The way in which CA3 is allowing a single unscrupulous employer to run amok over established principles of arbitration procedural law demonstrates a clear need for this Court to straighten out CA3's wayward reasoning.

Broad-based issues in need of a national precedent

The forced liabilty release already established a need for this Court to make official what several lower courts have already hinted at but have yet to come right out and say: that the historic common-law/public policy prohibition against imposition of a liabilty release onto the receipt of wages and benefits is an integral and important part of ERISA.

The forced-waiver issue, however, is only one reason why

this Court should take this case. The **jury trial**, for persons resisting compulsory arbitration, issue is, by itself, grounds for this Court to decide the merits of this case. The jury trial is always an important right in any context, but, from what Petitioner can see in reading cases, the jury trial under 9 USC 4 is one of the most underutilized tools available to persons resisting arbitration. What little case law exists on this subject is a hodge-podge of conflicting and inconsistent decisions ranging from the permissive (the party can demand a jury trail on any regular contract issue) to the ultra-restrictive (the right only goes to a narrow set of issues requiring affidavits to establish). So unusual is the demand for a jury trial in resisting arbitration that the district court apparently thought Petitioner's demand was some kind of *pro se* error and paid no attention to it. From what this Petitioner can tell, this Court has never even indirectly addressed this issue.

Thus, this Petition brings forth at least two separate issues badly in need of a definitive precedent from this Court.

Misconduct of the arbitrator

In addition to both of the above, the Court has before it in this one case, ***every*** shortcoming of arbitration as a viable alternative to the jury trial: from shady employers (this one) determined to stack the deck before an arbitration even begins, to arbitrators who are lawyers first and "neutrals" a distant second, through to the organization itself clearly willing to sacrifice the rights of the weaker-strength party(s) for the sake of the accounts-receivable register (when Petitioner tried to solicit an *amicus*-type pleading from the AAA defending their Rules against the incursions from this employer, they couln't run away far enough or fast enough), and culminating with federal courts carrying federal policy "favoring" arbitration to extremes so as to look the other way at patently flawed arbitrations. The way in which this arbitrator trashed the published schedule and rendered terminated the case *sua sponte* should have been knee-jerk grounds to disallow his decision, yet both lower courts subscribed to the absurd notion

that Petitioner had "consented" to such. Even if he had, such "consent", as a mater of common law, would be unconscionable and unenforceable.

As both the AAA itself and the individual.arbitrators themselves become more comfortable with employer-paid arbitration, the more the compromising influences it brings will be "accepted". This Petitioner can but guarantee than in the coming months and years the federal courts,including this one, are going to see more and more cases complaining of the corruptive influences of employer-paid arbitration. Sooner or later this Court is going to have ot deal with this issue; it might as well be now before any other employment-dispute arbitrants are cheated out a meritorious claim the way this Petitioner was.

Lastly, there is the way in which CA3 abused the "NOT PRECEDENTIAL" designation. It should readily obvious to this Court that CA3 is using this designation as a device to hide what they have to know is an intrinsically bad decision. There is simply no such thing as "not precedential"; this Respondent a mojor Philadelphia employer and once word-of-mouth starts to spread that thay have been given the green light by the circuit court of appeals to impose a general liability release onto ERISA protected benefits, it is only of time (and probably not a very long one) before thay all start doing it. This situation illustrates a clear need for this Court to admonish the lower courts that the "not precedential" or "not for publication" stamp is **not** a license to issue palpably bad decisions, nor to indulge favoritism toward one party, or punitove reasoning toward another.

* * * * * * * * * * * * * * * * *

There is simply no polite way to put it; the CA3 decision at issue in this Petition is a mind-bogglingly bad decision under any light. **This Court needs to act.**

Respecfully submitted on the 19th day of June, 2006

L. Paul Dieffenbach, Jr; Petitioner *Pro Se*

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4085

L. PAUL DIEFFENBACH, JR
Appellant

VS

INTERNATIONAL REHABLIITATION ASSOCIATES
d/b/a INTRACORP

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 02-cv-07903)
District Judge: Hon. J. Curtis Joyner

Submitted Under Third Circuit LAR 34.1(a)
October 14. 2005
Before SLOVITER, BARRY and FISHER, CJs

(Filed: October 18, 2005)

OPINION

PER CURIAM

Appellant, L. Paul Dieffenbach, filed this action against his employer, Intracorp, claiming he was improperly denied sererance benefits and that his wages were improperly garnished pursuant to a state tax lien. He later amended his

complaint to include claim of age discrimination and unlawful discharge to avoid pension vesting. On December 23, 2002, the District Court granted the motion to compel arbitration, holding that Dieffenbach was bound by the written agreement to arbitrate all disputes arising out of his employment. In 2004, the parties entered into a written Settlement Agreement and Release, calling for Intracorp to pay Dieffenbach $17.544 Dieffenbach took the position that the Release did not include his ADEA claim or ERISA discharge claim. An arbitrator granted Intracorp's motion for enforcement of the Agreement, holding that the Release covered all claims. Dieffenbach then returned to the District Court and sought to quash the award, while Intracorp moved for enforcement. On August 16, 2004 the District Court confirmed the arbitrator's award in all respects and dismissed the case. After the District Court denied Dieffenbach's timely filed motion for reconsideration, Dieffenbach timely filed this appeal. We have jurisdiction pursuant to 28 USC 1291 and 9 USC 16(a)(1)(D).

Dieffenbach raised a host of issues on appeal, but after a careful review of the record we find no basis to disturb the District Court's judgment. Among other things, Dieffenbach argues that the arbitrator impermissibly "reversed" a prior ruling by the District Court finding the waiver of his ADEA claims unenforceable, Appellant's Br. at 16. The record is clear, however, that the District Court did not consider the enforceability of the arbitration agreement or waiver of the ADEA claims until after the arbitration proceeding when it confirmed the award. Dieffenbach also contends that the arbitrator's award cannot stand because the arbitrator reached his decision without holding a hearing, Appellant's Br. at 24. As the District Court correctly observed, however, the arbitrator decided the matter pursuant to to the parties' Settlement Agreement, and the Settlement permitted the issues to be

heard and decided on a summary basis without a hearing. Moreover, the record fully supports a finding that Dieffenbach's execution of the arbitration agreement, as well as his execution of the Settlement Agreement and Release, were knowingly and voluntarily given, and Dieffenbach presents us with no credible or persuasive argument to the contary. Cf. *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281 (3rd Cir 2003).

We have considered Dieffenbach's remaining arguments, but we find those arguments without merit and in no need of separate discussion. We note that the Appellee's Brief fully and accurately sets forth the reasons why Dieffenbach's various contentions must be rejected. For the reasons stated, we will affirm the District Court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4085

L. PAUL DIEFFENBACH, JR
Appellant

VS

INTERNATIONAL REHABLIITATION ASSOCIATES
d/b/a INTRACORP

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 02-cv-07903)
District Judge: Hon. J. Curtis Joyner

Present: SCIRICA, *Chief Judge*, SLOVITER, ALITO
ROTH, MCKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH FISHER, and VAN ANTWERPEN

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Applellant having been submitted to all judges who particiapted in the decision of the court, and to all the other available circuit judges in active service, and a majority of the circuit judges who concurred in the decision not having asked for a rehearing and a majority of the circuit judges in regular active servcie not having voted for rehearing en banc, the petition for rehearing is hereby DENIED.

BY THE COURT

/s/ D. Michael Fisher

Dated: November 16, 2005

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(stamped: FILED DEC 23 2002)

L. PAUL DIEFFENBACH, JR

VS Civ 02-7903

INTERNATIONAL REHABLIITATION ASSOCIATES

MEMORANDUM OPINION AND ORDER

WEINER, J DECEMBER 23, 2002

The plaintiff filed this action against the defendant. his for mer employer, claiming 1) he was denied severance benefits because he refused to sign defendant's Agreement and Release that contained waiver language he found objectionable and 2) that his wages were improperly garnished pursuant to a State of Maryland tax lien. The defendant has filed a motion to compel arbitration and stay the proceedings,

The plaintiff is clearly bound by a written agreement to arbitrate all disputes arising out of his employment (or termin ation thereof) with the defendant. On March 28, 1994, plaintiff became a full-time employee of the defendant and remained so until his termination in 2002. On January 21, 2000, plaintiff signed an Employee Handbook Receipt which states the following:

> This is to ackonwledge that I have received my copy of the July 1998 employee handbook, **You and CIGNA.** I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment described in **You and CIGNA:** (1) my employment can be terminated by me or my employer at any time for any reason-therefore my employment is at the will of either party, and 2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company -therefore, rather than go to court ... to decide my legal claim I will submit my employ-

(filing stamp illegible)

ment related legal claims other than workers compensation and unemployment compensation to final and binding neutral third-party arbitration. I understand further that these two terms of my employment replace and supercede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company.

The Employee Handbook, **You and CIGNA,** contains the following Arbitration Policy:

A. STATEMENT OF POLICY

In the interest of fairly and quickly resolving employment-related disagreements and problems, and applying the important public policies expressed in the Federal Arbitration Act. 9 USC Sec. 1 et.seq, and in state arbitration laws , CIGNA Healthcare Division's policy is that arbitration by a neutral third party is the required and final means for the resolution of any employment related claim not resolved by the Division's internal dispute resolution process. Both the Division and the employee will be bound by any decision made by a neutral arbitrator. If the employee or the Division does not abide by the arbitrator's deciision, either party may go to court to enforce the arbitrator's decision, but arbitration must be used before going to court. This policy is intended to prevent the Division and an employee from going to court over employment related disputes; it is not intended to take away any other rights.

B. SCOPE OF THE ARBITRATION PROCEDURE

This policy covers only serious employment-related disagreements and problems, which are thise that concern a right, priviledge, or interest recognized by applicable law. Such serious disputed (sic) include claims, demands, disputes, controversies or actions under Title VII of the Civil Rights Act of 1964, the Civiil Rights Act of 1866, the Civil Rights Act of 1991, the Equal Pay Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Family and Medical Leave Act, and any other federal, state, or local statute, regulation, ordinance ,

> or common law doctrine regarding employment discrimination, retaliation, whistleblowing, conditions of employment or termination of employment....

Prior to ordering arbitration, the court must determine (1) whether the parties entered into a valid arbitration agreement, and (2) whether the specific dispute falls within the scope of that agreement. John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 137 (CA3 1998). In conducting this review, the court should apply "ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration" Moses H. Cone Mem'l Hosp v. Mercury Construction Co. 460 US 1 24 (1983). Once the court answers these two questions in the affirmative, the court must stay or dismiss the proceedings in favor of arbitration. John Hancock, 151 F.3d at 157.

In the case sub judice, plaintiff entered into a valid arbitration agreement with defendant by virtue of his continued employment and by acknowledgment of his obligation to arbitrate under the Arbitration Policy through the receipt he signed on January 21, 2000. In addition, the dispute over plaintiff's severance benefits and the defendant's withholding from his wages clearly concerns serious employment-related disagreements and problems as those terms are defined in the Arbitration Policy.

None of the arguments plaintiff raises in his oppsition either individually or collectively overcome the fact that plain tiff explicitly agreed that he would submit his employment related legal clamis to arbitration.

For the foregoing reasons, we will grant the motion to compel arbitration and dismiss the case without prejudice, pending completion of the arbitration.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(stamped: FILED DEC 3 2003)

L. PAUL DIEFFENBACH, JR

VS Civ 02-7903

INTERNATIONAL REHABLIITATION ASSOCIATES

WEINER, J

ORDER

The motion of the defendant for sanctions and for enforcement of settlement agreement (Doc #18) is DENIED with leave to renew after the partiess complete arbitration.

IT IS SO ORDERED.

/s/ Charles R. Weiner

(stamped: ENTERED DEC 4 2003 CLERK OF COURT)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(stamped: FILED AUG 13 2004)

L. PAUL DIEFFENBACH, JR

VS Civ 02-7903

INTERNATIONAL REHABLIITATION ASSOCIATES
(d/b/a INTRACORP)

ORDER

AND NOW, this 12th day of August, 2004, upon consideration of Plaintiff Motion to Quash the Arbitrator's Award and Defendant's Counter-Motion to Enforce the Arbitrator's Award. it is hereby ORDERED that the Defendant's Motion is GRANTED, the Plaintiff's Motion is DENIED and the Award entered by Arbitrator Colflesh on January 27, 2004, is CONFIRMED (f/n 1) in all respects and hereby made a

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1. Generally speaking, for an arbitration agreement to be governed by the federal arbitration act, 9 USC 1, (FAA) it must be found to be a contract evidencing a transaction in interstate commerce, Goodwin v. Elkins& Co 730 F2d 99 (CA3 1984). Such a finding is a factual determination to be made by the district court. Id Given that record here is insufficient to determine whether or not the agreement to arbitrate is to be construed under the Federal Arbitration Act or the Pennsylvania Uniform Arbitration Act, 42 Pa.C.S. 7301 et seq, we shall consider the relevant provisions of both acts. See, e.g. State Farm Mutual Automobile Insurance Co. v. Coviello 233 F.3d 710 (CA3 2000). Specifically, with regard to motions to vacate arbitration awards, the two statutes provide, in pertinent part:

9 USC 10: same; vacation, grounds, rehearing

(a) In any of the following cases the United States court in and for district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearings. upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or of

(stamped: ENTERED AUG 16 2004 CLERK OF COURT)

Judgment of this Court as follows:

1. Defendant's Motion for Sanctions under FRCP 11 is DENIED;

2. Defendant's Motion for Enforcement of the Agreement and Release executed by Plaintiff on October 31, 2003 is GRANTED and in accordance with the terms and conditions of the Agreement and Release, this matter is DISMISSED pursuant to Local Rule of Civil Procedure 41.1 (b).

BY THE COURT

/S/ J. Curtis Joyner, J

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any other misbehavior by which the rights of any party may have been prejudiced; or

(4) where the arbitrators exceeded their powers. or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

42 PaCSA 7341: Common law arbitration

The award of an arbitrator in a nonjudicial arbitration which is not subject to subchapter A (relating to statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award.

In this case the record is devoid of any evidence that the award was the result of fraud, corruption, undue means, or bias, partiality, or misconduct on the part of the arbitrator. Thus we find no basis to vacate the award under the FAA.

The record is also very clear that there was no arbitration hearing in this case. Rather, the arbitrator decided this matter on the basis of the Agreement and Release hich the parties entered into on November 3, 2003 settling the claims claims which the plaintiff raised in this lawsuit and finding that the defendant's Motion for Enforcement of Agreement and Release should be granted. Included at para. 8 of that Agreement and Release is an Arbitration clause which provided in relevant part that plaintiff and defendant further agreed to arbitrate anything "related in any wat ot the validity of this Agreement, or how it is interpreted or implemented....by arbitration....conducted under the Employment Dispute

Resolution Rules of the American Arbitration Association as modified by the Company..." Under Rule 12 of the Cigna Healthcare Division Employment Dispute Arbitration Rules and Procedures "the arbitrator may consider and motion for summary disposition, keeping in mind that the purpose of arbitration is a speedy and cost effective resolution of the dispute. In determining whether to grant summary disposition, the arbirator will apply the law in the same manner as federal court would in the same jursidiction."

Thus we find that, by signing the Agreement and Release, the plaintiff agreed to submit the issues of validity, interpretation, and implementation thereof to arbitration and agreed that any arbitrator assigned to hear and decide those issues could do so on a summary basis without a hearing. For these reasons, we find no basis to set aside the arbitrator's decision under the Pennsylvania Uniform Arbitration Act either.

OYEE HANDBOOK RECEIPT AND AGREEMENT

ıced In Employee's
l File — Payroll &
l Records Department

This is to acknowledge that I have received my copy of the July 1998 employee handbook, ***You and CIGNA***. I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment described in ***You and CIGNA***: (1) my employment can be terminated by me or my employer at any time for any reason – therefore, my employment is at the will of either party, and (2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company – therefore BEFORE GOING rather than go to court or to a government agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to final and binding neutral third party arbitration. I understand further that these two terms of my employment replace and supersede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company.

L. PAUL DIEFFENBACH, JR
Print Name

L. Paul Dieffenbach 1/21/00
Signature Date

180-36-8324
Social Security Number

*(*The term "the Company" means the particular CIGNA subsidiary or company that employs you.)*

Apx 13

BEST AVAILABLE COPY

(Severance contract clause) **8. Arbitration.** Without in any way affecting the release in paragraph 4, any and all disagreements, or claims listed below will be resolved exclusively by arbitration in the city where you work today, or if there is no American Arbitration Association ("AAA") office in the city where you work, in the nearest city with an AAA office. Arbitration will be conducted under the Employment Dispute Resolution Rules of the American Arbitration Association, ***as modified by the Company*** (emphasis supplied). Copies of the Arbitration Policy and Rules of Procedure can be obtained from your Human Resources Representative.

(the remainder of the clause is omitted as irrelevant to the point being argued)

(Cigna Arbitration Rule) **8. Power of the Arbitrator**

Arbitration under the Rules and Procedures will be governed by the Federal Arbitration Act (Title 9 U.S.C. Sec 1, et seq) The arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise before, during, and after the arbitration hearing. The arbitrator's power is limited to rights which would be protected in court. The arbitrator must apply the burden of proof required by applicable federal, state, or local law. THE ARBITRATOR WILL HAVE NO POWER TO CHANGE CIGNA'S POLICIES AND PROCEDURES (emphasis supplied), including this one, to change the law applicable to the facts, or to substitute his/her business judgment for that of CIGNA. **The arbitrator must enforce, and not deviate in any way, from these rules and procedures** (emphasis supplied).

(Cigna Arbitration Rule) **12. <u>Summary Disposition</u>**

The arbitrator may, in his/her discretion, consider any motion for summary disposition, keeping in mind that the purpose of arbitration is a speedy and cost effective resolution of disputes. In determining whether to grant summary disposition, the arbitrator will apply the law in the same way as a federal court would in the same jurisdiction.

Supreme Court, U.S.
FILED
SEP 8 - 2006
OFFICE OF THE CLERK

Docket no. **05-1634**

UNITED STATES SUPREME COURT

L. PAUL DIEFFENBACH, JR..
Petitioner *Pro Se*

V.

INTERNATIONAL REHABILITATION ASSOCIATES, INC
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL MOTION FOR A SUMMARY VACATUR

L. Paul Dieffenbach, Jr.
on his own behalf
13 Wyncroft Drive
Media, Pa, 19063
(610) 566-7783
PAULDIEF01@aol.com

AUTHORITY

The Court's authority to grant summary relief on the merits is enabled by SCR 16.1. While the Rule does not specifically allow that such relief may be sought by motion of a party, neither does the Rule say that it can't. Even if this is an unusual Motion, Movant begs the indulgence of the Court as the matter at issue is a particularly unusual decision.

In the not-too-distant past, this Court has used summary disposition on the merits only in the most unusual of cases; from what Movant can glean from studying this Court's website, however, the Court is making more liberal use of this efficient devise for issues sufficiently obvious to warrant this Court's intervention but not requiring full plenary consideration.

The two main criteria to justify summary action on the merits under SCR 16.1 is that the essential facts are clear and not in dispute, and that applicable law is well settled; as hereinafter set forth, this case meets these two criteria several times over.

PURPOSE

The purpose of this Motion is to bring directly to the immediate attention of the Court's what is *quite likely the single worst decision ever to come out of a federal appeals court* as being unilaterally and radically inconsistent with both fact and law and, accordingly, setting unthinkably bad precedent, As such, this Motion intends to demonstrate, the lower court's one-page whitewash of substantive issues badly in need of definitive precedent speaks for itself in making clear that the corrective hand of this Court is needed against errors so obvious that full plenary consideration would be a waste of this Court's valuable and limited resources.

By all rules of right, reason, and law, this case have never have even reached this Court..

TABLE OF CITATIONS

(writer's note: the at-issue decision is so far outside the limits of applicable law that there is little established precedent to either support or discredit it; hence the paucity of citation in this pleading)

U.S. Supreme Court cited:

Oebre v. Entergy Operations, Inc
522 US 422 (1998) 6

U.S. Third Circuit Court of Appeals cited:

Wastak v. Lehigh Valley Health Network;
342 F.3D 281 (2003) 7, 9

United Satates Code cited:

Older Workers Benefit Protection Act;
29 USC 626 6

MOTION FOR A SUMMARY VACATUR

Facts

By not availing themselves of their right, under the Rules of this Court, to respond to the initiating Petition for Writ of Certiorari, the Cigna Group (Respondent) acknowledges the facts as stated in the PetCert; including and in particular :

A) that Movant was the only one of the entire (layoff) group for whom direct replacements were recruited, hired, and trained (PetCert, p. 5 @ (14));

B) that the OWBPA statistical summary was "fudged" by the inclusion of the names of younger workers whom the company had no intention of laying off; and that the real target of the 2002 group layoff group was the 3 older workers (PetCert, p. 6 @ (15));

C) that the employer (Respondent) rebuffed all efforts by Movant to enter into negotiations for the OWBPA-intended "tailored" severance contract; demanding instead that Movant either execute an ADEA waiver as condition of receiving basic benefits or go out the door with nothing (PetCert, p. 6-7 @ (16, 17, 18)).

Other Admissionss and Concessions

One of the issues raised in the initiating Petition is whether employer-paid arbitrations give the employer purse-string leverage (if the paying party isn't happy with the "quality" of the arbitrator's work they can delay, dispute, or refuse payment of the provider's four or even five-figure billing) over both the arbitrator and the arbitration service provider and thus creates an obvious and substantial compromise of arbitration's basic guarantee of a blind and unbiased dispute-resolution forum (PetCert p. *iii,* @ (14); p. 10 @ (27),(28)). In their Brief wth the lower court, Respondent's attorneys all

but admitted that employment-dispute arbitration is **both** professional-favoritism **and** money bisaed by suggesting that Movant, as employee-arbitrant handling his own case (**f/n 1**), might have gotten a fairer shake from the arbitration process if he (Movant) had insisted on an arbitrator who is not a lawyer by trade (Exh 2, top) and/or been contributing a greater share of the total costs (Exh 2, center).

Not only is Cigna's statement that Movant "could have selected a non-lawyer (as arbitrator)" a dubious argument to be making in a case where the impartiality of the arrbitrator is being drawn into issue, but is completely untrue as a matter of fact. As set out the initiating Petition, of fourteen potential arbitrators offered to the parties, only *one* did not list their primary occupation as "attorney" (PetCert, p. 9 @ (26)), and Respondent's attorneys have never denied that the one non-lawyer was the first name removed as one of their three pre-emptive strikes (PetCert, p. 10 @ (29)), and, in fact, Movant complained directly to both the Association and the district court of the AAA's lack of qualified non-lawyer arbitrators to hear cases with an unrepresented party on one side and the arbitrator's fellow lawyers on the other.

The initiating Petition for Certiorari (p. 14 @ (44)) details how the arbitrator, who is an attorney by trade and is fully aware that his compensation is coming all but directly from the employer's legal department, without notice or opportunity of the affected parties to object, abandoned the published schedule of the proceedings and proceeded directly to *sua sponte* decision on the merits over the all-but-screaming objections of a party (PetCert p. 15 @ (45) also documents how Movant submitted a formal grievance to the Association over the matter). It is not necessary to repeat or recite such details as the district court not only observed, but seemed to emphasize, that the arbitrator reached his final decsion without a holding a proper hearing (Exh 3).

1. one of the supposed advantages, to lesser-strength parties, of arbitration is that the entire process is supposed to be "user friendly" and handling one's own case isn't supposed to carry the same negative stigma as it does in court.

Argument One

Once either or both of the lower courts established as on-the-record fact that the arbitrator proceeded directly to a *sua sponte* decision without notice or hearing. it shoild have been a knee-jerk decision to disallow the arbitrator's award.

Instead, the central premise of the lower courts' decisions is the finding that the employee-arbitrant (Movant) "agreed" to some unspecified alternative (to the official rules of arbitration) process, which "consent" included a standing, before-the-fact waiver to a hearing with the arbitrator (Exh 1-B and 1-C, ll 34-40). Not only is there *no evidence whatsoever* that the employee (Movant) ever gave anything even approaching such consent, but, on the contary, the record is abundantly clear that Movant had no intention of waiving his right to a full and fair hearing in front of the arbitrator; this Court should note that neither of the lower courts established exactly where this "consent" can be found, how it is worded, and. most importantly, how such "consent" survived the strict scrutiny to which courts are *supposed* to subject any waiver of an important right or protection.

Further, in order to make the implied-waiver theory "fly", CA3 is deliberately blurring the essential distinction between a *settlement*, which is an official pleading in which the parties agree to end an active lawsuit, and which has no legal force or effect until it is approved by the presiding judge and entered into the record, and a *release*, which is a private contract which may or may not carry any weight in court. **There is not now and never was any *settlement*** as that term is being used, or more correctly, ***mis***used, in the at-issue decision.

Viewing the real evidence in the light most favorable to the Respondent, Movant, at best, did nothing more than consent to the allowance of a certain type of motion to be made to the arbitrator (Exh 4), and even viewing such "consent" in this favorable light requires the courts to ignore the questions of whether there is any such thing as the court-type Motion for

Summary Judgment in arbitration, and whether the official Rules of the American Arbitration Association can be modified or set aside by private contract alone (Exh 5).

The fallacy of the central premise of the lower court's decision should be self-evident: the unexplained expansion of a weaker-strength party's simple consent to permit a specific type of arbitration motion into a standing consent to allow the arbitrator to proceed to directly to a final decision without notice, hearing, or discovery is not only grounds for summary reversal by this Court, but the entire idea is preposterous.

The ultimate futility of the lower courts' reasoning on this issue is established by the unconroverted fact that Respondent, as employment-dispute arbitrant, *never even made the requisite motion.* The record is clear and uncontested that the Respondent never made any such "Motion for Summary Disposition", as required by their own in-house rule, nor was there any mention of Cigna's whimsical "summary disposition" rule in the arbitraor's decision; repudiation of the official schedule and proceeding directly to a no-hearing decision, without notice or opportuntiy to object, was something the arbitrator simply did of his own choosing, without initiation or approval of anyone but himself.

Argument Two

As already noted, the lower's finding that Movant agreed to some vaguely construed "summary disposition" process by the arbitrator begs the obvious question of whether there is any place at all for the court-type summary judgment (or "summary disposition" as Respondent calls it) in employment dispute arbitration. Given that the employee is clearly the weaker-strength party to an arbitration contract, any such "agreement", if one did exist, would fairly bristle with issues about predatory, onconscionable, and overreaching contracts.

It is well settled at common law that a competent adult cannot consent to an intrinsically illegal act. This rule can and

should be applied by this Court to arbitration law; i.e, absent an official provision of the AAA's employment-dispute rules and practices sanctioning it, there is simply **no such thing** as the court-type motion for summary judgment in employment arbitration. Accordingly, the individual employee cannot "consent" to any such a watered-down alternative (to the official Rules of the AAA) process clearly intended to stack the deck in favor of the employer.

Inseparable from the consent issue is the matter of whether the official Rules of American Arbitration Association can be modified by private contract. The type of alternative process to which the lower court says Movant gave his consent requires a standing and substantial modification of the Rules of AAA (which the Association *says* it opposes **(f/n 2)**), as distinguished from a case-specific, single-instance deviation from a specific Rule (which the AAA does allow). Given that the official Rules of the AA are. for all intents and purposes, arbitration law, it should be obvious to this Court that the Rules of the AAA can no more be modified ot set aside by party-specific contract than can the Rules of this Court be modified or set aside by private contract.

In addition, this Court should also note that Respondent's self-serving summary disposition rule (Exh 4) is due-process deficient on its face in that it makes no provision for the other party to oppose it.

Despite being argued fully and repeatedly, these two issues were ignored by both lower courts in their zeal to find "consent" to a lesser process where there clearly was none.

Argument Three

In an effort to bolster what the lower court surely knew to be a tenuous line of reasoning ("consent" to a *sua sponte* decision by the arbitrator), the at-issue decision makes its own

2. Movant received nothing but excuses (not to act) from the AAA when he asked them to certify to the lower courts that it opposes modification or setting aside of its Rukles by private contract.

finding that Movant's ADEA waiver was "knowing and voluntary" as that essential term is defined by the 1991 Older Workers Benefit Protection Act (OWBPA; 29 USC 626). Again, this finding is so obviously defective on its face as to warrant summary reversal by this Court.

In 1998 OWBPA received a sweeping endorsement from this Court in *Oebre v. Entergy Operations, Inc*, 522 US 422, in which this Court found that OWBPA "sets up its own regime", and that each and every one of its requirements is absolute and must be strictly complied with. Most laid-off ADEA's (Movant included) would readily agree thst the single most important requirement of OWBPA is the mandate that the ADEA waiver not be imposed upon the receipt of monies the employer is already obligated to pay the employee upon cessation of employment; 29 USC 626 (f)(1)(D).

In a flagrant trivialization of both *Oubre*.and OWBPA itself, the lower court doesn't even mention the statutory tests of "knowing and voluntary", but rather makes a quantum leap directly from the mere fact that Movant received a severance check (Exh 1-B, ll.10-12) to a finding that the ADEA waiver was "knowing and voluntary" (Exh 1-C, ll.41-44 (note again misuse of the word *settlement* at both places **f/n 3**)).

As part of his cessation from employment from Cigna, Movant received the following monies, which were clearly defined in the severance contract as follows:

Basic severance:	$15,000.00
Late payment penalty (mandated by Pennsylvania wage laws)	$1,500.00
Resolution of wage garnishment claim	$1.044.96
Total:	$17.544.96

As a benefit promised to the employee (Movant) in the event of no-fault-of-his-own job loss, the **basic severance** is

3. Not only was the subject document not a "settlement" in either substance or form, but also was not captioned as a "settlement", and in fact did not even contain the word *settlement*.

clearly "something to which (Movant) is already entitled" as contemplated by OWBPA; likewise, the late payment penalty, which kicked in while Movant and Respondent argued over the madatory-release severance policy, is an entitlement as matter of statute, while reimbursement for a disputed 1998 wage garnishment is totally unrelated, factually, legally, and chronologically, to Movant's layoff from Cigna.

Stated in OWBPA's own language, none of the monies received by Movant can, even if viewed in the light most favorable to the employer, be considered to be the free-standing *consideration* given in exchange for surrender of ADEA rights and protections. Accordingly, the lower court's leap directly from the naked fact that Movant received a severance check, without examining what those monies represent, and howthey relate to OWBPA's *special consideration* clause, is clearly in error, and grounds by itself for summary reversal of the entire decision.

The fallacy in the lower court's seat-of-the-pants finding that Movant's ADEAwaiver was "knowing and voluntary" is further established by the fact that the one (!!) citation in the entire decision is grossly inapproriate to the point it is trying to support. The plaintiff in *Wastak v. Lehigh Valley Health Network* (Exh 1-C, l 46) was a disciplinary firing and, as such, *Wastak* was correct in finding that any severance pay Mr. Wastak received was **not** anything "to which (he) was already entitled" under OWBPA; the text of *Wastak* is also unclear as to whether the employer had a structued severance *plan* or gave out severances on a case-by-case basis; two distinctly different situations both legally and factually. *Wastak* is therefore a far cry from the case at bar where the employee is a reduction-in-force layoff protected by an ERISA-regulated job-loss benefit plan. Not only could the lower court not have picked a more inapproriate citation, out of the plethora of available cases on this topic, but lumping him in with disciplinary firings is a personal insult to Petitioner-Movant.

Argument Four

Underlying, and possibly even overriding, all of the aforegoing is still another in-and-of-itself grounds for this Court to vacate the entire CA3 decision without the need for plenary review: directly apparent from the record is the all but unarguable fact that the root issue should never have been sent to arbitration in the first place.

The original subject-matter issue is and always has been **not** whether this particular (severance) contract is illegally structured, but whether Respondent's severnace-pay **policy** mandating the execution of a general liabilty release as condition of receiving basic benefits, and from which policy a standard non-negotiable severance contract is drawn, is intrinsically illegal under the combination of OWBPA, Pennsylvania wage laws, and the long-standing public policy against employers' use of wages and benefits as leverage to exonerate themsleves from unrelated liabilities. Accordingly, before any arbitrator (or court) could find the release to be illegal, they would first have to find the policy itself to be illegal.

One of the cardinal rules of arbitration law is that no party can be compelled to arbitrate any matter not covered by the basic agreement. Whether the policy issue is INcluded in the arbitration agreement here is not even open to discussion as the issue is directly and succintly EXcluded from the Cigna arbitration program by the following statement:

> "The arbitrator will have no power to change Cigna's policies and procedures, including this one."
>
> Cigna Arb. R. 8 (see Exh 6)

This policy-matters restriction on the arbitrator is as clear and legally binding as the laws defining the jurisdiction of this Court, and arbitration-supervising courts are required to observe and apply it if called upon to do so; nevertheless, both lower courts inverted the long-standing rule that the particular

always controls over the general in matters of law and contract, and instead emphasized the basic one-sentence agreement to arbitrate "any" employment-related disputes.

Despite being argued by Movant at several places in the proceedings, the policy-matters exclusion was never mentioned by either of the lower courts in any of their writings.

Argument Five

Finally, aggregated to the compound errors inherent in the at-issue decision is the established point that the matter of whether the protected party's ADEA waiver is "knowing and voluntary" is simply not a summary disposition subject..

In *Oubre* this Court noted that the issue of "knowing and voluntary", as set forth in OWBPA, goes to the state of mind of the party and is, by itself, a material issue of fact. Likewise CA3 itself, in *Wastak*, noted that the issue of a "knowing and voluntary" ADEA waiver is a jury trial issue (see Exh 7). Accordingly, this Court should note with interest, not only does the only case citation (*Wastak*) in the at-issue decision not support the ultimate conclusion of the lower court, but rather *Wastak* actually works directly against it.

Thus, *even if* Cigna's summary dispoaition rule were other wise permissible, and *even if* Cigna had made a proper motion under their own rule, and *even if* AAA arbitrators had general authority to issue summary judgments, the decision, without a proper hearing, of the issue of whether Movant's ADEA waiver was "knowing and voluntary" is reversable error in and of itself

An agreement to arbitrate is not an agreement to trivialize federal rights and protections; diminution of the substance and importance of federal labor-law protections seems to be a recurrent theme in both lower courts' sending these matters to arbitration, and in particular their willingless to rubber-stamp a badly mishandled employment arbitration.

The At-issue Decsion Sets Shockingly Bad Precedent

The CA3 decision at issue goes far beyond mere bad reasoning; this decision is judicially irresponsible and just plain dangerous, Appellate leval courts have a strong public-interest obligation to be mindful of how their decisions not only bear directly on the immediate parties, but also how their decisions may impact all other persons subject to the same laws; this important socio-legal responsibilty has been clearly lost on the lower court, at least as far as this particular decision is concerned.

This Court should be appalled at the way CA3 is willing to preach bad law so as to help a major area corporation's legal department "save face" against a *pro se* litigant. This Court also needs to express its highest degree of disapproval of CA3's misuse of the "NOT PRECEDENTIAL" designation as a license to issue bad decisions. Even though the case was not publiished, it involves one of the city of Philadelphia's largest employers; in addition, both the arbitrator and the AAA's officers who fielded Movant's grievances, are aware of this case and following its outcome.

In one single short-sighted decision. the lower court has sent the following messages out to the parties, to Philadelphis area employerss and to the Third Circuit legal community at large:

√ given the green light to employers to smokescreen a general liability release as part of "earning" an ERISA benefit;

√ placed arbitrators on notice that they are free to jettison the official "rules of the game" at will in pursuit of a big paycheck with a minimum of work;

√ placed arbitrator providers on notice that their published promises of a "full and fair" dispute resolution forum are eseentially meaningless.

These rulingss put all persons protected by ERISA, ADEA, and OWBPA directly in harm's way. This reason alone is cause for this Court to rid the overall body of federal case law of this aberration as quickly and thoroughly as possible.

REASONS WHY SUMMARY ACTION IS JUSTIFIED

It shoud be obvious to the Justices of this Court, both collectively and individually, at first reading of the at-issue decision, that the lower court isn't even attempting to make a well-reasoned, objective, and *correct* resolution of the stated issues, but rather is grasping for excuses (a major "consent" which simply is not there; a finding that Movant's ADEA waiver was "knowing and voluntary" when it is clear that the ADEA-protected layoff's (Movant's) basic benefits were being held hostage to the forced execution of such a waiver) not to embarass Cigna's legal department and/or their high-priced attorney to to whom the "farmed out" the appellate work by finding a major (Cigna) company policy to be illegal at the behest of a disgruntled former employee who isn't represented by an attorney. Likewise, the very idea that three experienced federal appeals-court judges could indendently and objectively concur in this far-fetched decision literally defies rational belief (this Court will notice that of the three CA3 judges to whom the at-issue decision is ascribed, none of them are wlling to take direct "credit" for it; i.e, admit that they wrote it).

It is difficult to envision a one-page decision containing a greater number of errors, or more severe degree of error, than the at-issue CA3 decision. Taken in the aggregate, the at-issue decision is grossly and patently in error from first word to last; it is precisely this kind of decision for which this Court's powers of summary reversal/vacatur were given.

WHEREFORE, pursunat to all of the aforegoing, Movant prays the Court for the following relief:

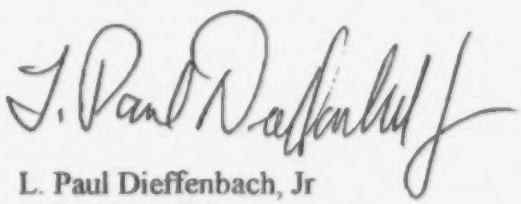
that the at-issue CA3 decision be **vacated in its entirety** as being clearly, patently, and entirely in error, and that the matter be sent back to the lower court with instructions to make a *real* decision on, at the very least, the ERISA/liability release issue; and that the matter be sent back to the lower court with the following intuitively obvious instructions:

1) absent an official Rule of the American Arbitration Association specifically providing for it, there is no such thing as a "Motion for Summary Judgment" in employment dispute arbitration;

2) the official Rules of the American Arbitration Association cannot be modified by private contract alone;

3) a genuine hearing before the arbitrator is a right guaranteed by both federal and state law(s), and , as with any important right, it can only be lost through clear, voluntary, and written, or otherwise on-the-record, waiver.

Respectfully submitted on the 8th day
of September, 2006



L. Paul Dieffenbach, Jr
Petitioner/Movant *pro se*

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4085

L. PAUL DIEFFENBACH, JR
Appellant

VS

INTERNATIONAL REHABLIITATION ASSOCIATES
d/b/a INTRACORP

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 02-cv-07903)
District Judge: Hon. J. Curtis Joyner

Submitted Under Third Circuit LAR 34.1(a)
October 14. 2005
Before SLOVITER, BARRY and FISHER, CJs

(Filed: October 18, 2005)

OPINION

PER CURIAM

1) Appellant, L. Paul Dieffenbach, filed this action against
2) his employer, Intracorp, claiming he was improperly deni-
3) ed sererance benefits and that his wages were improperly
4) garnished pursuant to a state tax lien. He later amended his

complaint to include claim of age discrimination and unlawful discharge to avoid pension vesting. On December 23, 2002, the District Court granted the motion to compel arbitration, holding that Dieffenbach was bound by the written agreement to arbitrate all disputes arising out of his employment. In 2004, the parties entered into a written Settlement Agreement and Release, calling for Intracorp to pay Dieffenbach $17.544.46. Dieffenbach took the position that the Release did not include his ADEA claim or ERISA discharge claim. An arbitrator granted Intracorp's motion for enforcement of the Agreement, holding that the Release covered all claims. Dieffenbach then returned to the District Court and sought to quash the award, while Intracorp moved for enforcement. On August 16, 2004 the District Court confirmed the arbitrator's award in all respects and dismissed the case. After the District Court denied Dieffenbach's timely filed motion for reconsideration, (he) timely filed this appeal. We have jurisdiction pursuant to 28 USC 1291 and 9 USC 16(a)(1)(D).

Dieffenbach raised a host of issues on appeal, but after a careful review of the record we find no basis to disturb the District Court's judgment. Among other things, Dieffenbach argues that the arbitrator impermissibly "reversed" a prior ruling by the District Court finding the waiver of his ADEA claims unenforceable, Appellant's Br. at 16. The record is clear, however, that the District Court did not consider the enforceability of the arbitration agreement or waiver of the ADEA claims until after the arbitration proceeding when it confirmed the award. Dieffenbach also contends that the arbitrator's award cannot stand because the arbitrator reached his decision without holding a hearing, Appellant's Br. at 24. As the District Court correctly observed, however, the arbitrator decided the

matter pursuant to to the parties' Settlement Agreement, and the Settlement permitted the issues to be heard and decided on a summary basis without a hearing. Moreover, the record fully supports a finding that Dieffenbach's execution of the arbitration agreement, as well as his execution of the Settlement Agreement and Release, were knowingly and voluntarily given, and Dieffenbach presents us with no credible or persuasive argument to the contary. Cf. *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281 (3rd Cir 2003).

We have considered Dieffenbach's remaining arguments, but we find those arguments without merit and in no need of separate discussion. We note that the Appellee's Brief fully and accurately sets forth the reasons why Dieffenbach's various contentions must be rejected. For the reasons stated, we will affirm the District Court's judgment.

Importantly, Plaintiff selected Mr. Colflesh as the arbitrator, knowing he was a lawyer. Plaintiff could have selected a non-lawyer. Pl. Brief at 3 n.1.[6]

Alleged Bias of the Tribunal. Plaintiff alleges, in effect, that the entire arbitration tribunal was tainted with bias, because it was paid for largely by one party, Defendant. Pl. Brief at 3 & 3 n.2. This could be construed as an effort vacate pursuant to FAA Section 10(a)(2), which allows a court to vacate "[w]here there was evident partiality or corruption in the arbitrators, or either of them." Under the standards set forth *supra*, page 20, Plaintiff has again failed to make the necessary showing.

The Court need look no further than the basic facts. It is undisputed that under the Arbitration Agreement, Plaintiff had the option of paying only a $100 filing fee, or sharing equally in the fees. Supp. App. at 60. It was *Plaintiff* who chose not to share equally in the fees, as he could have.[7]

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[6] In addition to Plaintiff's consent to this practice, Plaintiff's argument was waived by his failure to raise this issue until after he knew his arbitration case was going to be dismissed. *E.g., AAOT Foreign Econ. Ass'n v. Intl. Dev. and Trade Services., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998) (a party having knowledge of alleged bias of an arbitrator cannot remain silent for a period and then object, because the objection has been waived); *York Research Corp. v. Landgarten*, 927 F.2d 119, 122 (2d Cir. 1991) (an objection based upon facts known before the proceeding begins may not be raised after it has begun).

[7] Moreover, as with the failure to timely protest the appointment of a lawyer as arbitrator, Plaintiff failed to protest this practice before the arbitration tribunal in a timely manner, thereby waiving the objection. See discussion *supra* fn. 6.

Exh 2

Judgment of this Court as follows:

1. Defendant's Motion for Sanctions under FRCP 11 is DENIED;

2. Defendant's Motion for Enforcement of the Agreement and Release executed by Plaintiff on October 31, 2003 is GRANTED and in accordance with the terms and conditions of the Agreement and Release, this matter is DISMISSED pursuant to Local Rule of Civil Procedure 41.1 (b).

BY THE COURT

/S/ J. Curtis Joyner, J

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any other misbehavior by which the rights of any party may have been prejudiced; or
(4) where the arbitrators exceeded their powers. or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

42 PaCSA 7341: Common law arbitration

The award of an arbitrator in a nonjudicial arbitration which is not subject to subchapter A (relating to statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award.

In this case the record is devoid of any evidence that the award was the result of fraud, corruption, undue means, or bias, partiality, or misconduct on the part of the arbitrator. Thus we find no basis to vacate the award under the FAA.

The record is also very clear that there was no arbitration hearing in this case. Rather, the arbitrator decided this matter on the basis of the Agreement and Release hich the parties entered into on November 3, 2003 settling the claims claims which the plaintiff raised in this lawsuit and finding that the defendant's Motion for Enforcement of Agreement and Release should be granted. Included at para. 8 of that Agreement and Release is an Arbitration clause which provided in relevant part that plaintiff and defendant further agreed to arbitrate anything "related in any wat ot the validity of this Agreement, or how it is interpreted or implemented....by arbitration....conducted under the Employment Dispute

(Cigna Arbitration Rule) **12. Summary Disposition**

The arbitrator may, in his/her discretion, consider any motion for summary disposition, keeping in mind that the purpose of arbitration is a speedy and cost effective resolution of disputes. In determining whether to grant summary disposition, the arbitrator will apply the law in the same way as a federal court would in the same jurisdiction.

(Severance contract clause) **8. Arbitration.** Without in any way affecting the release in paragraph 4, any and all disagreements, or claims listed below will be resolved exclusively by arbitration in the city where you work today, or if there is no American Arbitration Association ("AAA") office in the city where you work, in the nearest city with an AAA office. Arbitration will be conducted under the Employment Dispute Resolution Rules of the American Arbitration Association, ***as modified by the Company*** (emphasis supplied). Copies of the Arbitration Policy and Rules of Procedure can be obtained from your Human Resources Representative.

(the remainder of the clause is omitted as irrelevant to the point being argued)

(Cigna Arbitration Rule) **8. Power of the Arbitrator**

Arbitration under the Rules and Procedures will be governed by the Federal Arbitration Act (Title 9 U.S.C. Sec 1, et seq) The arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise before, during, and after the arbitration hearing. The arbitrator's power is limited to rights which would be protected in court. The arbitrator must apply the burden of proof required by applicable federal, state, or local law. **The arbitrator will have no power to change Cigna's policies and procedures** (emphasis supplied), including this one, to change the law applicable to the facts, or to substitute his/her business judgment for that of CIGNA. **The arbitrator must enforce, and not deviate in any way, from these rules and procedures** (emphasis supplied).

against Lehigh Valley." Wastak answered that he did. As for Wastak's claim that he signed the waiver involuntarily given his financial circumstances and fragile mental state, while Wastak correctly notes that such claims should usually be decided by a jury, we agree with the District Court that Wastak has not come forth with sufficient evidence to create a genuine issue of material fact with regard to any lack of understanding or voluntariness on his part in signing the Release. Wastak testified that he was able to comprehend the nature of the Release. He was also of a sufficient mental state to make several attempts to retain legal counsel. Wastak asserts that after he was terminated he faced the prospect of serious financial pressures, conditions that ultimately caused him to suffer severe depression and anxiety, for which he sought psychological treatment and medication. There is, however, no evidence in the record to support the claim that he was experiencing mental impairments when he signed the Release, and the law is clear that the existence of financial pressure to sign a waiver is insufficient to establish that it was executed involuntarily. *See, e.g., Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 452 n.2 (3d Cir. 1988) ("[E]conomic pressure alone is insufficient to establish a claim of duress that would void an otherwise valid release."); *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 893 (3d Cir. 1975).

Wastak's complaint also seeks relief under the PHRA, but that claim is similarly barred by the Release. As correctly noted by the District Court, the statutory provisions of the OWBPA apply only to ADEA claims, and thus, the effect of the Release with regard to the state PHRA claims is "determined by the ordinary meaning of the language contained therein." *Strickland v. Univ. of Scranton*, 700 A.2d 979, 986 (Pa. Super. Ct. 1997). Here, the Release unambiguously prohibits Wastak from pursuing claims under the PHRA, and Wastak has come forth with no evidence of fraud, duress or other circumstances sufficient to invalidate the agreement. *See, e.g., Bowersox Truck Sales & Serv., Inc. v. Harco Nat'l Ins. Comp.*, 209 F.3d 273, 279 (3d Cir. 2000) (stating, in a case involving Pennsylvania law, that " '[a] signed release is binding upon the parties unless executed and procured by fraud, duress, accident or mutual mistake.' " (quoting *Three Rivers Motors*, 522 F.2d